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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1343

STANLEY GLUCKSMAN,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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STANLEY GLUCKSMAN,

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—v.—

THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER, STANLEY GLUCKSMAN, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit rendered the 12th day of January 1971, affirming the judgment of the United States District Court in the Eastern District of New York which convicted Petitioner of the crime of violating 18 U.S.C. § 201(c) (4a) (receiving a sum of money while conducting a tax audit while employed as an Internal Revenue Agent). He was acquitted of another count and the Court dismissed a third, after the close of the Government's direct case (solicitation, and unauthorized receiving, respectively).

Opinion Below

The Court of Appeals failed to render any opinion. Its order of affirmance is annexed.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1). The order of the Court below is dated January 12, 1971.

Questions Presented

1. Whether the Petitioner was deprived of a fair trial under the Fifth Amendment when the trial Court remarked to the Jurors that a grand jury indictment made it probable that the Petitioner had committed a crime?

2. Whether Petitioner was deprived of a fair trial in violation of the Fifth Amendment when the Prosecutor (in this threadbare case resting on a single accomplice-informer only), mentioned a prior bribe involving Petitioner, but whereof he had been acquitted?

3. Whether this Court, in the exercise of its "supervisory powers" over federal tribunals, should require some degree of corroboration where the Government's case rests, as it does herein, solely upon the uncorroborated testimony of an accomplice-informer who had received a promise of immunity, and hopes not to be indicted.

Constitutional and Statutory Provisions Involved

The Fifth Amendment and 18 U.S.C. § 201(c) (4a) are herein involved.

Introductory

The Petitioner is a former career Internal Revenue Agent who had enjoyed an exemplary reputation and whose fidelity and patriotism to this country had been manifested by voluntary enlistment in the armed service and over-seas duty for many months. He took the witness stand in his own defense and vehemently denied the accusations of one Pincus, an accountant, who had told the Government, after receiving a promise of immunity, that four years earlier, during an audit of a client, Petitioner allegedly received $3,000 in connection with his duties and had supposedly given more lenient consideration than might otherwise have been anticipated.

There was no corroboration of this alleged bribe. There was a serious doubt that any leniency in the audit was extended.

The jury acquitted on one count and the Court, on motion, on another. In this close case, therefore, a delicate balance of credibility could tip the scales. It was thus grave error for the prosecutor to have mentioned another bribe case of which the Petitioner was acquitted as it was "ejusdem generis". This error was exacerbated by the Court's statement that the indictment indicated that the Petitioner "probably" had committed a crime.

While it is true that the Petitioner, Glucksman, has not been sentenced to prison, but only placed on probation, he has nevertheless been severely punished as he may not now enter certain professions including his own chosen field of accounting, as an individual practitioner; he has lost certain other rights; he has suffered by the obloquy of con-

viction for a felony; and on top of this believes himself to have been unjustly convicted.

As this Court said as long ago as 1866 in *Cummings* v. *Missouri,* 4 Wall. 277, 320:

> "The deprivation of any rights, civil or political previously enjoyed, may be *punishment,* the circumstances attending and the causes of the deprivation determining this fact." (Emphasis ours.)

Statement of the Case

The sole witness for the prosecution who inculpated the Petitioner, Glucksman, was one Bernard Pincus, a Certified Public Accountant, who had gotten himself involved in a criminal investigation conducted by the Government. While it appears that Pincus was not being investigated with reference to the case at bar, he had been promised immunity for cooperation in a criminal investigation. In the Court of Appeals, the Government made a somewhat Janus-faced, casuistic argument that seemed to chide the petitioner herein for misstating a reference to immunity vis à vis Pincus. The inescapable fact is that Pincus admitted that he had indeed been promised immunity, albeit not in connection with this particular case[1, 2] (11a; 12a). If in the

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[1] Numericals in parentheses refer to pages of the Appendix in the Court below where the suffix "a" is used; where the prefix "tt" is used, they refer to the trial trial transcript.

[2] Immunity would seem to extend to any use of the testimony as well as the transaction being discussed (*Counselman* v. *Hitchcock,* 142 U.S. 547; *United States* v. *Monia,* 317 U.S. 424; *Hale* v. *Henkel,* 201 U.S. 43; *Stevens* v. *Marks,* 383 U.S. 234. cf. *Piccirillo* v. *New York,* U.S. , cert. granted and then denied after argument 1/25/71, but transactional immunity seems to be required).

course of discussion, any testimony arose concerning this case, the immunity would preclude prosecution therefor in the event it (the evidence) flowed naturally and responsively to the inquiry being made by the government.

Thus it appears to have been less than candid of Pincus when in response to the direct examination by the government, he denied ever being promised immunity.

> "Q. Were you ever promised immunity in this case? . . . A. No, Sir." (11a); (tt 39)

On cross examination, however, the same witness, Pincus, paradoxically responded:

> "Q. Did this take place in the United States Attorney's office in Manhattan? A. Yes. . . .
> "Q. *Were you promised immunity?* A. *Yes.*" (12a; tt 52)

The government in the Court below took a "negative pregnant" position that, *strictissimi juris,* the immunity was not promised in this instant case, but as the footnote, *supra,* indicates (footnote 2), the immunity would in all likelihood extend to anything elicited or received in the context of the inquiry.

Moreover, the witness, Pincus, frankly admitted that he had not been indicted, even though the trial court denominated him as an accomplice (36a; tt 552):

> "I charge you as a matter of law that . . . Mr. Pincus, who testified that he handled the bribe transaction . . . are accomplices within the meaning of the law."

Moreover, Pincus testified that as a result of his cooperation he "hoped" that he would never be indicted. (12a; tt 52, 53).

Pincus therefore was an informer and had strong motives of self-preservation to appear to be as useful to the government as possible. On this we add that the events about which he testified were admittedly at least 4 years old. (12a)

> "Q. How long after this event happened did you volunteer this information? How many years between the time you allegedly paid the money to Mr. Glucksman and the time you volunteered the information to the United States Government? A. Approximately four years.
>
> "Q. Was that before you were involved in any cases or after? A. After.
>
> "Q. Four years later? A. Yes.
>
> "Q. Have you ever been indicted? A. No, sir."

Bernard Kushner, the taxpayer involved, admitted that at the request of Pincus, his accountant, he gave Pincus $3,500 in $100 bills for an alleged payment to be made to Glucksman (Pincus alone alleged that he gave $3,000 thereof to Petitioner, retaining $500 for himself, thus lying to and cheating his own employer as well).

Kushner had no personal knowledge of any payment or bribe to Glucksman and thus was not a "corroborative" witness. Pincus alone gave incriminating evidence.

The report of Investigation indicates that Petitioner was under investigation from November 18, 1968 to September 9, 1969 according to a report signed by George H. Vuilleumier, Jr., inspector of Internal Revenue. There was gross prejudice wrought by the Government when, during cross

examination of the Petitioner himself, who took the stand, the prosecutor asked if in February 1966 the Petitioner was under investigation for the alleged acceptance of "a" bribe, *not* the instant case! (16a; tt 495).

The Court told the jury, after objection, to disregard the question and draw no inferences unfavorable to the defendant.

So far as whether any lenient treatment was meted out to the taxpayer by Glucksman, it is clear that several witnesses called by the defense placed this in serious doubt. While it may have become a jury issue, that does not change the fact that Pincus alone, was the sole and exclusive source of any allegation of criminality or impropriety by Petitioner.

Moreover, it was undisputed that a different agent, Mr. Cohen, was assigned to audits for subsequent years, so Glucksman would not be involved in any event. (Marshall tt 454); (Greco tt 462); (Stayer tt 410).

Needless to say that the Defendant-Petitioner took the stand in his own behalf and categorically denied the charges.

POINT I

In this tenuous case where evidence of alleged guilt rested exclusively upon the specious testimony of an accomplice-informer (Pincus), it was highly prejudicial and a denial of a fair trial under the Fifth Amendment for the court to have charged that an indictment indicated that the Defendant-Petitioner was "probably" guilty.

—A—

Equally, and perhaps more prejudicial, was the insidious revelation by the prosecutor to the jury that the Petitioner had been previously under investigation for another bribe, despite the fact that it was known to the Government that he had been acquitted of that charge.

A perusal of the trial record herein leaves no doubt but that the proof offered by the prosecution was about as "thin" as one could imagine. It rested exclusively upon the uncorroborated testimony of an accomplice by the name of Pincus who, by his own admission, did not reveal the alleged commission of any crime involving petitioner until four years after the event and then only under the stress of trying to prove to the Government that he could be helpful to them so that he might thus save his own "hide".

The testimony of Pincus was counterbalanced by the flat denials of the Petitioner himself, who took the witness stand in his own defense, and who had never previously been convicted of any crime. Moreover, it appeared that his character was good and that he had even volunteered for service in the armed forces of his country—something which is almost a revelation in itself, nowadays.

In this context one might well expect that a *one witness versus one witness trial* would ordinarily implant a reason-

able doubt in the minds of a juror. It was therefore extremely urgent that the balance be carefully preserved. (*Snyder* v. *Massachusetts,* 291 U.S. 97.)

In its charge to the jury, the Court inadvertently said that (30a, 31a; 546, 547):

> "The Grand Jury hears certain testimony by *investigative agents* of the government and comes to the conclusion that a crime was probably committed and that it is *probable that a crime was committed by the defendant* . . ."

The trial court it is true later corrected itself to say that an indictment has no probative value. But the fact remains that in this tenuous case where the scales of credibility were teetering on a razor's edge, this assertion could well have been the "straw" that was needed to tip them against Glucksman.

Moreover, the Court, by adverting to "investigative" *agents* in the plural transmitted to the jurors the impression that evidence was presented before the grand-veniremen that the petit talismen did not hear.

In this case, there were no "investigative" agents as substantive witnesses of guilt. The self-confessed criminal, Pincus, who became an informer and "hoped" he would never be indicted for his supposed participation in the bribe transaction was the only witness, i.e., as to criminality.

The trial Court should not have made this comment about grand jury testimony and the belief of such panels. It was tantamount to a suggestion that there was a belief in "guilt" on the part of the grand jury, else they would not have indicted. Such a comment flies in the face of this

Court's admonition in *United States* v. *Murdock,* 290 U.S. 389. See, also *United States* v. *Goldstein,* 2 Cir., 120 F.2d 485, 491, aff'd 316 U.S. 114. No comment on "probable guilt" was warranted in these circumstances and it could only have been prejudicial.

In this case, the accomplice's testimony had to be viewed with "suspicion" and with the "very greatest care and caution" (*Crawford* v. *United States,* 212 U.S. 183, 204; *United States* v. *Caci,* 2 Cir., 401 F.2d 664, cert. denied, 394 U.S. 917).

To exacerbate the situation and to make the prejudice overwhelming, the prosecutor injected the fact that the Petitioner had previous to the instant charges been under investigation for a bribe which necessarily meant that he had a criminal bent or propensity. The charges here were under investigation beginning in November 1968. The prosecutor adverted to a bribe investigation in 1966 which necessarily had to implant the thought that there was a previous bribe charge. To be sure this had been the case, but the Petitioner was acquitted of that accusation and under no circumstances should it have been adverted to.

An immediate objection was made, but the Court only emphasized the problem and dilemma by cautioning the jurors to disregard it. (16a-17a; tt 495, 496).

> "Q. When did you resign from the Internal Revenue Service? A. February 1966.
>
> "Q. Wasn't that during the time you were under investigation for the alleged acceptance of a bribe?
>
> "Mr. Gallop: Objection.
>
> "The Court: Sustained. Please disregard that question and do not draw any inference from the question unfavorable to the defendant. . . .

> "Q. What was the reason you resigned from the service? A. I had a *medical disability.*"

The defendant-Petitioner had refrained from calling character witnesses for fear of opening up the prior incident. But certainly the fact of an acquittal should have precluded inquiry altogether. (*Mapp* v. *Ohio,* 367 U.S. 643; *Simmons* v. *United States,* 390 U.S. 377; *Davis* v. *Mississippi,* 394 U.S. 721.)

An acquittal is never permissible to be shown as a method of impeachment (*Hurst* v. *United States,* Cir. 5, 337 F.2d 678, 681).

With regard to the admonition to disregard the remarks, this court has recognized that such a "mental gymnastic" is impossible and there is no certainty that the jurors will follow the instruction (*Jackson* v. *Denno,* 378 U.S. 368; *Bruton* v. *United States,* 391 U.S. 123; *Krulewitch* v. *United States,* 336 U.S. 440).

In *Nash* v. *United States,* 54 F.2d 1006, 7 (CA 2), Judge Hand referred to such an instruction as ". . . the recommendation of a mental gymnastic which is beyond, not only their powers, but anybody else's."

In *United States* v. *Bozza,* 2 Cir., 365 F.2d 206, 215 the Court very aptly noted:

> "Not even Appellate Judges can be expected to be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand called a 'mental gymnastic which is beyond not only their power, but anybody else's. . . .'"

Since this error was substantial, it cannot be assumed that it was "harmless" in such a thin case as this.

In *Chapman* v. *California*, 386 U.S. 18, the Supreme Court explained, *inter alia*:

> "The question is whether there is a reasonable *possibility* that the evidence complained of *might* have contributed to the conviction". (Emphasis ours.)

Under the circumstances, it is submitted that there was substantial error committed and a new trial is warranted.

POINT II

This Court, in its supervisory powers over the federal courts ought to require corroboration in close cases where the only testimony is that of an accomplice-informer who is seeking to escape prosecution and has indicated that he has neither been indicted nor prosecuted, but in fact has been enticed with promises of immunity.

Despite the protestations of the Respondent in the Court below that the informer-accomplice, Pincus, had not been promised immunity with respect to *this* particular case, it is manifest from the record that he admitted being promised immunity which would cover anything naturally flowing from his testimony (see footnote 2, *supra*).

This fact is even more significant in light of the ruling by the trial court that Pincus was an accomplice as a matter of law, coupled with the uncontested admission that he had neither been indicted or prosecuted and hoped that he never would so be.

This Court has supervisory powers over the federal Courts and can formulate rules of evidence to achieve

"fundamental fairness". (*Ker* v. *California*, 374 U.S. 23; *McNabb* v. *United States*, 318 U.S. 332.)

In *McNabb*, this Court observed:

> ". . . we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. . . ."

In *McNabb* v. *United States*, the Court continued:

> "We hold only that a decent regard for the duty of *courts as agencies of justice and custodians of liberty* forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." (Italics ours.)

In *Williamson* v. *United States*, Cir. 5, 311 F.2d 441, 445, that Court likewise noted:

> "What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined, crude, subtle or spectacular."
>
> Accord: *United States* v. *Scoles*, 14 USCMA 14, 33 CMR 226.

Thus, not only was an accomplice permitted to act as the sole uncorroborated witness against Glucksman, but in addition it is clear that he was strongly motivated to color

his testimony to please the government in order to achieve his admitted hope that he would not be indicted or prosecuted and that he would receive immunity.

This Court ought not to permit such evidence to be used to convict a man of a felony.

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of Federal Courts. If it has a duty to perform, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity . . . the untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts . . . *The government of a strong and free nation does not need convictions based upon such testimony.*" *Mesarosh v. United States,* 352 U.S. 1, 9, 14 (Italics added).

In this closely balanced case, the sole accomplice's testimony, flatly contradicted by the petitioner, was improperly bolstered by the unwarranted interjection by the government that he had been previously under investigation for a bribe (of which he was acquitted).

> "Certainly, it was calculated to and we must presume did adversely affect the jury in its deliberations. Certainly, it is reasonably possible that such errors may and could "have *tipped the scales against the defendant.* Such errors, therefore, must be held to have been prejudicial." *People* v. *Purvis,* 60 Cal. 2d 323, 353; 384 P. 2d 424, 443.

Accord: *Chapman* v. *California, supra.*

Only this Court can rectify the injustice herein and preclude convictions based upon this type of informer-accomplice evidence.

The Petitioner, though not sentenced to prison, has and will suffer greatly and is precluded from practicing his profession as a public or certified accountant. He urgently seeks justice and proclaims his innocence.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted:

IRVING ANOLIK
Attorney for Petitioner Glucksman

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of January one thousand nine hundred and seventy-one.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

STANLEY GLUCKSMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk